



## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. HOUSE PRINCIPLES ANALYSIS:

Safeguard individual liberty – This bill will require notice to a homeowner, through several different methods, that the homeowner may be due any surplus funds available following a residential foreclosure sale and how the homeowner may collect any surplus funds.

#### B. EFFECT OF PROPOSED CHANGES:

##### **Residential Foreclosure**

A foreclosure is a legal procedure whereby the property that is pledged as security in the mortgage document or deed of trust is sold to satisfy the debt. The foreclosure procedure brings the rights of the parties and all junior lienholders to a conclusion and passes title in the subject property to either the person holding the mortgage document or deed of trust or to a third party who purchases the realty at a foreclosure sale. Property sold by foreclosure is free of the mortgage and all junior liens.

##### *Types of Foreclosure*

**Judicial Foreclosure:** Pledged property is sold by court order after the mortgagee has given sufficient public notice. Upon a borrower's default, the lender may accelerate the due date of all remaining monthly payments. Then the lender's attorney files a suit to foreclose the lien.

**Deed in Lieu of Foreclosure:** An alternative to foreclosure would be for the lender to accept, or "buy" a deed in lieu of foreclosure from the borrower. This is sometimes known as a "friendly foreclosure" because it is by agreement rather than by civil action. The major disadvantage to this manner of default settlement is that the mortgagee takes the real estate subject to all junior liens; foreclosure eliminates all such liens.

**Deeds of Trust:** Under many deeds of trust forms, the trustee is usually given a power of sale in case of default. Here there is no court action because the trustee himself gives public notice of the sale (this can be on a door of the courthouse and/or by an advertisement in the paper). He then holds a trustee sale and the property is sold at public auction. A trustee sale is fast and can usually be accomplished in 80 to 120 days because trustees do not have to wait for court action. The money the trustee obtains from the sale would then be applied to the principal of the mortgage debt plus the accrued interest and legal costs incidental to the sale. Any excess over and above what is due any lienholder is returned to the defaulted borrower.

##### *Right of Redemption*

This concept provides that if, during the course of a foreclosure proceeding but before the foreclosure sale, the borrower or any other person who has an interest in the real estate (such as another creditor) pays the lender the amount currently due, plus costs, the debt will be reinstated as before.<sup>1</sup>

##### **Florida Law**

Chapter 702, F.S., governs foreclosures of mortgages, agreements for deeds, and statutory liens. After a complaint in a foreclosure proceeding has been filed, the mortgagee may request an order to show cause for the entry of final judgment. The court is required to immediately review the complaint,

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<sup>1</sup> Lawyers Advantage Title Group, *Residential Foreclosures*, available at <http://www.lawyersadvantage.com/resources/foreclosures.htm> (last visited March 17, 2005).

and if the court finds that the complaint is verified and alleges a cause of action to foreclose on real property, the court must promptly issue an order to the defendant/homeowner to show cause (explain) why a final judgment of foreclosure should not be entered against the homeowner. The order must meet certain requirements, including requiring the mortgagee to serve a copy of the order to show cause on the defendant/homeowner. The order to show cause must be served in the following manner:

- If the mortgagor has been served with the complaint and original process, service of the order may be made in the manner provided in the Florida Rules of Civil Procedure; or
- If the mortgagor has not been served with the complaint and original process, the order to show cause, together with the summons and a copy of the complaint, shall be served on the mortgagor in the same manner as provided by law for original process.<sup>2</sup>

Under s. 49.08, F.S., if a plaintiff in a foreclosure proceeding meets certain service of process requirements, the plaintiff is entitled to have issued by the clerk or judge a notice of action which must provide:

(1) The names of the known natural defendants; the names, status and description of the corporate defendants; a description of the unknown defendants who claim by, through, under or against a known party which may be described as "all parties claiming interests by, through, under or against (name of known party)" and a description of all unknown defendants which may be described as "all parties having or claiming to have any right, title or interest in the property herein described";

(2) The nature of the action or proceeding in short and simple terms (but neglect to do so is not jurisdictional);

(3) The name of the court in which the action or proceeding was instituted and an abbreviated title of the case;

(4) The description of real property, if any, proceeded against.

Section 702.035, F.S., establishes the responsibility for informing the public concerning a foreclosure proceeding. This section states that "[w]henver a legal advertisement, publication, or notice relating to a foreclosure proceeding is required to be placed in a newspaper, it is the responsibility of the petitioner or petitioner's attorney to place such advertisement, publication, or notice. The advertisement, publication, or notice shall be placed directly by the attorney for the petitioner, by the petitioner if acting pro se, or by the clerk of the court."

### **Surplus Funds Following a Foreclosure Sale**

Following a foreclosure sale, once the proceeds have been distributed to the purchaser and any liens have been paid, surplus funds may be left over to which the original homeowner is entitled to claim. It has been reported that the original homeowner is often times not aware that any funds remain. It has also been reported that some individuals or companies have either contacted a homeowner and offered to collect the surplus funds for a fee, or have had the court release the surplus funds to the individual or company without the homeowner's knowledge, and then the individual or company may deliver a portion of the surplus funds to the original homeowner, minus a fee, or not deliver any of the surplus funds. It has been reported that a homeowner does not need legal assistance to collect any surplus funds. Complaints have been filed against some of those individuals.<sup>3</sup>

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<sup>2</sup> Section 702.10(1), F.S.

<sup>3</sup> Daily Business Review, *South Florida lawyer accused in mortgage scam is suspended*, Vol. 46, No. 45 (Feb. 2, 2005)(on file with the Civil Justice Committee).

## **HB 1311**

### **Notification**

This bill requires that a homeowner involved in a residential foreclosure proceeding be notified:

- in a newspaper, either by an advertisement, publication, or notice,
- in the summons and complaint to the homeowner, and
- in the copy of the order to show cause why the home should not be foreclosed on,

that the clerk of the court may have funds due to the homeowner following the foreclosure sale and how the homeowner may learn of the procedure to collect such funds, if any.

The bill provides a standard notice form that must be served on the homeowner and provides that the return of service must indicate whether the notice was included. The standard notice form also informs the homeowner that he or she may want to contact their local Legal Aid office for assistance. If the notice is not included, a court or clerk may not enter a default against the homeowner. A clerk of court may collect a \$25 fee for each attempt of service on a homeowner from the registry of the court following the foreclosure sale, which funds are to be used to educate the public about the rights of homeowners in foreclosure proceedings.

### **Transfer of Interest**

The bill also provides procedures that must be followed if a person wishes to transfer a homeowner's interest in any funds remaining from a foreclosure sale. Any document, other than a deed in lieu of foreclosure, that transfers an interest must disclose:

- the assessed value of the property;
- that the assessed value may be lower than the actual value of the property;
- the approximate amount of any debt encumbering the property;
- the approximate amount of any equity in the property; and
- any and all forms of consideration paid for the rights to the property or the assignment of the rights to any surplus funds.

The bill provides a procedure for a seller to void a transfer that does not meet the above requirements.

### **Disbursement of Surplus Funds**

Further, the bill defines surplus funds and provides a procedure for the disbursement of any surplus funds. The bill provides that any person claiming a right to disbursement of proceeds from a judicial sale, other than the original mortgagor, must produce a deed or assignment that discloses the following:

- the assessed value of the property;
- that the assessed value may be lower than the actual value of the property;
- the approximate amount of any debt encumbering the property;
- the approximate amount of any equity in the property;
- a statement that the assignor does not need an attorney or other representative to recover the surplus funds;
- any and all forms of consideration paid for the rights to the property or the assignment of the rights to any surplus funds.

The bill also provides how a person may set aside a deed or assignment that does not meet the above requirements, and that the person may be entitled to fees and costs in an action to set aside a nonconforming deed or assignment if he or she is the prevailing party.

### **Victimization of a Homeowner**

The bill provides a civil penalty of up to \$15,000 for victimizing a homeowner during a residential foreclosure proceeding. Further, the bill provides that a person may not contact the homeowner to offer to help the homeowner collect any surplus funds, to help with a foreclosure by buying the house, lend the homeowner money, or take an assignment until after 30 days after the homeowner receives the notice of foreclosure. A person may be subject to the civil penalty provided for in the bill for violating the no-contact provision. The bill also provides that it is not a violation if the dwelling subject to the foreclosure is encumbered with a substitute or additional lien.

#### **C. SECTION DIRECTORY:**

**Section 1.** Creates s. 45.0311, F.S., to define “surplus funds,” and to provide a procedure for the transfer of an interest in the proceeds of a judicial sale. This section also provides a procedure for the rescinding of an assignment of an interest, and also provides that the court shall determine any attorney’s fees for a motion to disburse surplus funds. This section also provides that in any proceeding to set aside an assignment of an interest in the proceeds of a judicial sale, if the homeowner is the prevailing party, then the homeowner is entitled to collect all fees and costs in such a proceeding. A court will determine reasonable attorney fees in such a proceeding.

**Section 2.** Creates s. 48.184, F.S., to provide an additional notice to be included with a residential foreclosure summons and complaint to a homeowner which informs the homeowner that surplus funds may be due to the homeowner following the foreclosure and to contact the clerk of court about any surplus funds following the foreclosure sale. The notice also informs the homeowner that the homeowner does not need an attorney to collect any surplus funds, and that companies or attorneys may not contact the homeowner until after 30 days after the homeowner receives this notice. This notice also informs the homeowner that he or she may contact their local Legal Aid office for assistance.

**Section 3.** Amends s. 48.21, F.S., to provide that any return of service for a foreclosure of an interest in a mortgager’s primary dwelling must include a confirmation that the notice described in section 3 of the bill was included in the service. This section allows a clerk to collect a fee of \$25 for each attempt of service from the court’s registry following a foreclosure sale but after any valid liens have been paid. Any funds collected must be used to educate the public about the rights of homeowners in foreclosure proceedings.

**Section 4.** Amends s. 49.08, F.S., to provide that the notice of action issued by a clerk or judge in a residential foreclosure proceeding must include a statement that the homeowner may be due surplus funds following the foreclosure sale, who to contact about any surplus funds, and that an attorney is not needed to collect any surplus funds.

**Section 5.** Creates s. 501.2078, F.S., to provide a civil penalty of not more than \$15,000 to victimize or attempt to victimize a homeowner during a residential foreclosure proceeding. This section also prohibits a person from contacting a homeowner in a residential foreclosure proceeding until after 30 days after the homeowner receives notice. Any violation of this prohibition is subject to the civil penalty. This section also provides priority to any order of restitution or reimbursement to a homeowner over a civil penalty for a violation of this section. This section also provides that any civil penalty collected must be deposited into the Legal Affairs Revolving Trust Fund to be used for consumer education of homeowners regarding residential foreclosure proceedings. The bill also provides that it is not a violation if the dwelling subject to the foreclosure is encumbered with a substitute or additional lien.

**Section 6.** Creates s. 689.251, F.S., to establish the requirements of any document, other than a deed in lieu of foreclosure, used to transfer an interest in the proceeds of a judicial sale of a mortgagor's primary dwelling. This section also provides that if the document does not meet the requirements established in this section, that the seller may void the transaction.

**Section 7.** Amends s. 702.035, F.S., to provide that any advertisement, publication, or notice in a newspaper relating to a foreclosure proceeding must state the procedure for collecting surplus funds, if any, or list a telephone number or website at which the procedure will be explained.

**Section 8.** Amends s. 702.065, F.S., to provide that a court or clerk may not enter a default or default judgment against a mortgagor if the return of service does not indicate that the required notice was served on the mortgagor.

**Section 9.** Amends s. 702.10, F.S., to provide that the copy of the notice to show cause provided by a mortgagee to a mortgagor must include the notice that the mortgagor may be due surplus funds following the foreclosure sale.

**Section 10.** Provides that the bill takes effect July 1, 2005.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

### A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None.

### B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

The bill allows the clerk of court to collect a \$25 fee from the court's registry following a foreclosure sale for the number of times service is attempted on a homeowner. It is unknown how many times a clerk may have to attempt service on a homeowner, so it is uncertain how much money may be collected from this fee.

2. Expenditures:

None.

### C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

Homeowners who are unaware that surplus funds may remain following a foreclosure sale may be able to collect any funds that exist.

### D. FISCAL COMMENTS:

None.

### III. COMMENTS

#### A. CONSTITUTIONAL ISSUES:

##### 1. Applicability of Municipality/County Mandates Provision:

This bill does not require counties or municipalities to take an action requiring the expenditure of funds, nor does it reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor does it reduce the percentage of state tax shared with counties or municipalities.

##### 2. Other:

The United State Supreme Court has addressed the issue of placing restrictions on commercial speech raised by this bill. The bill prohibits a person from contacting a homeowner until after 30 days have passed since the homeowner has received a notice of foreclosure. In *Florida Bar v. WENT FOR IT, INC.*, 515 U.S. 618 (1995), the U.S. Supreme Court reviewed whether the Florida Bar, under the First and Fourteenth Amendments of the Constitution, could restrict an attorney from contacting a potential personal injury client within 30 days of an accident.<sup>4</sup> The Court used the *Central Hudson* test for commercial speech which requires that: (1) the government assert a substantial interest in support of its regulation; (2) the government must demonstrate that the restriction on commercial speech directly and materially advances that interest; and (3) the regulation must be narrowly drawn.<sup>5</sup> The court found that: (1) the Florida Bar had a substantial interest in the restriction on direct mail solicitation in order to help bolster the reputation of Florida lawyers; (2) the restriction directly and materially advanced that interest because it prevented direct mail solicitation which, according to a Bar study, was found by the public to be intrusive on victim's and their families; and (3) the Bar's rule was reasonably well-tailored to meet its objective. The court did note that untargeted solicitation was different because the "untargeted letter involves no willful or knowing affront to or invasion of the tranquility or bereaved or injured individuals and simply does not cause the same kind of reputational harm to the profession."<sup>6</sup> It could be argued that the restriction in this bill is similarly designed to prevent intrusion by an attorney into a difficult time for a homeowner.

However, the bill uses the term "person" and does not limit the restriction to attorneys. Arguably, persons other than attorneys who seek to assist homeowners during a foreclosure do not face the same perceived reputational difficulties as attorneys. In considering a claim by a person that the bill's provisions are an unconstitutional restriction on commercial speech, a court would consider whether: (1) the government asserted a substantial interest in support of its regulation; (2) the government demonstrated that the restriction on commercial speech directly and materially advanced that interest; and (3) the regulation was narrowly drawn.

#### B. RULE-MAKING AUTHORITY:

N/A.

#### C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

### IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

On March 30, 2005, the Civil Justice Committee considered the bill and adopted one amendment and one amendment to that amendment. The amendment to the amendment added a provision in a form notice to a homeowner in a foreclosure proceeding that the homeowner may wish to contact his or her local Legal Aid office for assistance. The amendment, as amended, provided that a notice in a newspaper relating to a

<sup>4</sup> *Florida Bar v. WENT FOR IT, INC.*, 515 U.S. 618, 620 (1995).

<sup>5</sup> *Id.* at 624.

<sup>6</sup> *Id.* at 630.

foreclosure proceeding must inform a homeowner that he or she may be entitled to surplus funds and how the homeowner may learn of the procedures to collect any surplus funds. The amendment also defined the term surplus funds. Additionally, the amendment provided that a clerk of court may collect a fee of \$25 from the court's registry following a foreclosure sale for each attempt of service on a homeowner in a foreclosure proceeding. The bill, as amended, was reported favorably as a committee substitute.